

OCT 12 1977

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL RODAK, JR., CLERK

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October Term, 1977

No.

**77-549**

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ERNEST DWAYNE AGEE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE UNITED STATES

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Kenn Bradley  
Attorney for Petitioner  
4815 S. Harvard #138  
Tulsa, Oklahoma 74135

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Chief Justice and Asso-  
ciate Justices of the Supreme Court of  
the United States:

Ernest Dwayne Agee, the petitioner  
herein, prays that a Writ of Certiorari  
issue to review the judgment of the Uni-

ted States Court of Appeals, Tenth Circuit entered in the above entitled case on September 14, 1977.

#### OPINIONS BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, is reported 76-1522, and is printed in Appendix A hereto, infra, page A-1. The judgment of the United States District Court for the Northern District of Oklahoma is printed in Appendix B hereto, infra, page B-1.

#### JURISDICTION

The judgment of the United States Court of Appeals, Tenth Circuit, was entered on September 14, 1977. The jurisdiction of the Supreme Court of the United States is invoked under:

1. Federal Rules of Criminal Procedure Rule 32(c)(2), 18 U.S.C.A.
2. Title 18, U.S.C. §3577.
3. Federal Rules of Criminal Procedure

Rule 32(c)(1), 18 U.S.C.A.

#### STATUTE INVOLVED

Title 18, U.S.C. §§ 371 and 659

#### QUESTIONS PRESENTED

1. To determine guidelines for requiring corroboration of the testimony of an impeached accomplice upon whose testimony the government relies for conviction.
2. To determine the sufficiency of the evidence upon which a conviction was based in this case.

#### STATEMENT OF CASE

On September 1, 1975, a truck load of oil field pipe valued at \$16,000 and moving in interstate commerce was allegedly stolen from a truck stop in Tulsa, Oklahoma. From there the pipe was transported to a truck yard in Oklahoma City, Oklahoma, at which place the pipe was unloaded. Thereafter, the truck was abandoned on an



interstate highway north of Oklahoma City.

To prove its case the government called several witnesses. An employee of the company which manufactured the pipe introduced a bill of lading showing the origin of the pipe to be Lorraine, Ohio; and the destination to be Borger, Texas.

The owner of the truck allegedly stolen testified that he picked up the load of pipe in Lorraine, Ohio, on August 30, 1975, and had parked his truck at a truck stop in Tulsa, Oklahoma, on August 31, 1975, where he intended to spend the Labor Day weekend before completing his delivery. He further testified that he did not give Ernest Dwayne Agee permission to take his truck, and that his truck had been stolen from the Tulsa Truck Terminal in Tulsa, Oklahoma.

A truck driver who was sleeping at the Tulsa Truck Terminal testified that during the early morning hours of September 1, 1975, he was awakened by the sound of truck

hauling a load of pipe starting up, and notified the employee on duty that he believed the truck to be stolen.

Michael Dean Agee, brother of Ernest Dwayne Agee, testified that he was the employee working during the early morning hours of September 1, 1975, and that Ernest Dwayne Agee had been asking him about the truck just before it was reported missing.

Luther Leon Wolfe, alleged to be an unindicted co-conspirator, testified that he was with Ernest Dwayne Agee and Billie Martin Renfro at the time the truck was taken. He further testified that Ernest Dwayne Agee took the truck and followed the automobile driven by Billie Martin Renfro from Tulsa, Oklahoma, to Oklahoma City, Oklahoma. Mr. Wolfe testified that he helped Agee and Renfro unload the pipe in Oklahoma City, Oklahoma, and that Agee rode back to Tulsa, Oklahoma, with he and Renfro after abandon-

ing the truck.

A night watchman testified that he was working during the early morning hours of September 1, 1975, at the truck yard at which the pipe was unloaded, and identified Billie Martin Renfro as one of the three persons who arrived with the load of pipe.

The government then introduced separate statements signed by Ernest Dwayne Agee and Billie Martin Renfro. Agee stated that he had driven the truck to Oklahoma City, Oklahoma, where he helped unload the pipe, and then had abandoned the truck north of Oklahoma City, Oklahoma. He further stated that he had been hired by the owner of the truck who was paying him \$500 to do these acts, and that everything he did was pursuant to instructions given him by the owner of the truck. Renfro's statement was substantially the same.

Ernest Dwayne Agee testified in his own behalf reaffirming the things he had pre-

viously set forth in his signed statement. He further testified that the owner of the truck, after learning that he had given a statement to the authorities implicating said truck owner, had severely beaten him. During cross-examination of the witnesses, it was brought out that both the owner of the truck, and the unindicted co-conspirator were long-time acquaintances, and that they both had previous felony convictions.

#### REASONS FOR GRANTING WRIT

1. To determine the guidelines for requiring corroboration of the testimony of an impeached accomplice upon whose testimony the government relies for conviction.
2. To determine the sufficiency of the evidence upon which the conviction was based in this case.

At best the testimony of a co-conspirator is not entitled to the same credit as the testimony of other witnesses - SHIELDS

v. UNITED STATES 17 F. 2d 66. 47 S.Ct. 478,  
273 U.S. 583. Such testimony should be  
received and weighed with great caution -  
DOHERTY v. UNITED STATES 230 F.2d 605.

Although the uncorroborated testimony  
of an accomplice is sufficient in some  
circumstances to sustain a conviction, cor-  
roboration is necessary where there are  
additional circumstances which throw sus-  
picion upon such testimony. Where the tes-  
timony of the accomplice is contradictory,  
inconsistent, or where the witness has  
sworn falsely to a material matter. ESTERS  
v. UNITED STATES 260 F.2d 393, SYKES v.  
UNITED STATES 204 F. 909, and UNITED STATES  
v. HADERLEIN 118 F. Supp. 346.


#### CONCLUSION

Conviction in this case rests solely up-  
on the uncorroborated testimony of an ad-  
mitted accomplice who was thoroughly im-  
peached. In many jurisdictions, such evi-

dence would be insufficient to submit the  
cause to the jury. However, in the Feder-  
al Court system, no definitive guidelines  
are available for determining the necessity  
of corroboration for the testimony of an  
accomplice who has been impeached. It is  
petitioner's belief that the fact situation  
in this case merits consideration by the  
Supreme Court of the United States for the  
purpose of setting definitive guidelines  
for requiring corroboration of the testi-  
mony of an impeached accomplice.

For the foregoing reasons, this Petition  
for a Writ of Certiorari should be granted.

Respectfully submitted,

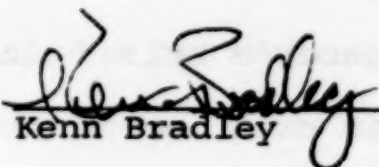
  
Kenn Bradley  
Attorney for Petitioner  
4815 S. Harvard #138  
Tulsa, Oklahoma 74135

#### PROOF OF SERVICE

I hereby certify that I served a full,  
true and correct copy of the Petition for



Writ of Certiorari and Appendices attached  
thereof to the United States Attorney for  
the Northern District of Oklahoma, Federal  
Bldg., Tulsa, Oklahoma, and to the Solici-  
tor General of the United States, Washing-  
ton, D. C. 20543.

  
Kenn Bradley

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
vs.	)	76-1522
	)	
ERNEST DWAYNE AGEE,	)	
	)	
Defendant-Appellant.)	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
vs.	)	76-1523
	)	
BILLY MARTIN RENFRO,	)	
	)	
Defendant-Appellant.)	)	

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT  
OF OKLAHOMA (D.C. No. 76-CR-32-C)

Submitted on the Briefs.

NATHAN G. GRAHAM, United States Attorney  
and KENNETH P. SNOKE, Assistant United  
States Attorney, for the Northern District  
of Oklahoma, Attorneys for the Appellee.

KENN BRADLEY, Tulsa, Oklahoma, Attorney for  
Appellants.

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Before SETH and HOLLOWAY, Circuit Judges,  
and CHILSON\*, Senior United States District  
Judge



CHILSON, District

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\*of the District of Colorado, sitting by designation

These consolidated appeals arise from appellants' convictions of conspiracy to steal goods in interstate shipment and of theft of goods in interstate commerce having a value in excess of \$100, in violation of 18 U.S.C. §371 and §659. The Briefs of Appellants are identical, and contend as to both counts and as to both appellants, that the evidence adduced at trial was insufficient to sustain the convictions. On a complete review of the record, we find no merit in the appeal.

On or about August 31, 1975, a load of 2-7/8-inch pipe was being shipped from Lorain, Ohio, to Borger, Texas, by truck driven by John Braun for Arrow Trucking Company. Braun testified that on the evening of August 31, he left his truck parked at the Tulsa Truck Terminal where it was to receive

some needed repairs; that the truck was locked, and there was a separate key in the ignition.

Another Arrow Trucking Co. driver, Gary Fortenberry, testified that he observed a late model Thunderbird, fitting the description of appellant Renfro's car, parked next to Braun's truck. Fortenberry testified that one of the three occupants got out of the car, examined the truck, and returned to the car which then was driven to the other side of the terminal.

Michael Dean Agee, brother of the appellant, Ernest Agee, testified that he was employed at the Tulsa Truck Terminal at the time of the theft; that his brother, Ernest, Billy Renfro and an unindicted co-conspirator, Luther Wolfe, were present at the Truck Terminal immediately before the theft; Ernest asked Michael for the key to John Braun's truck, but Michael refused. Shortly thereafter the truck was stolen.

Wolfe testified that Ernest Agee drove the truck to Oklahoma City, while Wolfe and Renfro followed in Renfro's Thunderbird. At approximately 3:00 A.M., they arrived at Hodges Truck Yard in Oklahoma City, Renfro told the security guard, John Rose, that they had a load of pipe to deliver. Rose let them in and Wolfe and the two appellants unloaded the pipe. Thereafter, according to Wolfe's testimony, the three abandoned the truck on a highway north of Oklahoma City; Agee threw the keys into a nearby ditch, and the three left in Renfro's car.

On September 2, one Dan Lloyd, president of W & L Steel Company, called the Hodges Truck Yard dispatcher to inquire about pipe which he was expecting. The Government introduced at trial exhibits showing a number of toll calls from appellant Renfro's home phone to Dan Lloyd's residence phone and to W & L Steel Co., prior to the theft.

Appellants complain that their convict-

ions rest largely upon circumstantial evidence which is insufficient to support the convictions.

"(I)n passing upon the sufficiency of the evidence to support a verdict of guilty, it is well established in this Circuit that the appellate court does not weigh conflicting evidence nor consider the credibility of the witnesses and, further, that it must view the evidence, both direct and circumstantial, in the light most favorable to the prosecution, together with all reasonable inferences that may be drawn therefrom."

UNITED STATES v. DOWNEN, 496 F.2d 314, 318 (10th Cir. 1974).

"The proof necessary to support a conviction for conspiracy is necessarily not direct. The nature of the offense and the secrecy involved require that the elements of the crime be established by circumstantial evidence, and the common purpose of plan may be inferred from the development or the combination of circumstances."

JORDAN v. UNITED STATES, 370 F.2d 126, 128 (10th Cir. 1966).

We have carefully reviewed the evidence and, applying the foregoing rules, determine the evidence is ample to sustain the conviction of both defendants on both counts.

Finally, appellants contend that their "participation in the single isolated trans-

action would be insufficient to warrant a conviction for the crime of conspiracy."

It is true that mere evidence of participation in a criminal act, without more, will not support a conspiracy conviction.

But such was not the evidence in this case.

The evidence sustains both the conspiracy charge and the theft charge.

"A conspiracy is an agreement between two or more persons to commit one or more unlawful act..."

UNITED STATES v. Thomas, 468 F.2d 422, 424 (10th Cir. 1972).

A conspiracy charge is entirely separate and distinct from the charge of committing the substantive offense.

PINKERTON v. UNITED STATES, 328 U.S. 640 (1946).

Appellants' contention that they could not be convicted and sentenced on both charges is without merit.

The judgments of convictions are affirmed.

UNITED STATES DISTRICT COURT FOR  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	Docket No.
	)	76-CR-32
	)	
ERNEST DWAYNE AGEE,	)	
	)	
Defendant.)	)	

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this 5th day of May, 1976, with his counsel Kenn Bradley, retained.

There being a verdict of guilty defendant has been convicted as charged of the offense of having violated T. 18, U.S.C., Sections 371 and 659, as charged in Cts. 1 and 2 of the Indictment.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the



defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ct. 1 - Two (2) years; Ct. 2 - Two (2) years, to run concurrently with the sentence imposed in Ct. 1.

It is further adjudged that the defendant may become eligible for parole at such time as the Board of Parole may determine as provided in T. 18, U.S.C.A., Section 4208 (a)(2).

s/H. Dale Cook  
U. S. Magistrate  
5-5-76